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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1033

WEBBS FABULOUS PHARMACIES, INC., AND ECKERD'S OF COLLEGE PARK, INC., *et al.*,
Appellants,

VS.

ARTHUR H. BECKWITH, JR., CLERK OF THE CIRCUIT COURT AND SEMINOLE COUNTY, FLORIDA,
Appellees.

AN APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR THE APPELLANTS

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AN APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR THE APPELLANTS

OPINION BELOW

This is an appeal from the final order and judgment of the Supreme Court of Florida entered October 4, 1979, denying Appellants' ("Webbs") Motion for Rehearing, and thereby affirming such Supreme Court's decision of May 31, 1979, upholding the Constitutionality of Florida Statute §28.33.

The decision of the Supreme Court of Florida appears at 374 So.2d 951 (1979) as *Arthur H. Beckwith, Jr., Clerk*

of the Circuit Court, etc., Appellants, vs. Webb's Fabulous Pharmacies, Inc., et al., Appellees. The decision appears verbatim as Appendix A to this brief and is appended hereto.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

This case is fundamentally a Constitutional challenge of a lengthy state statute which provides in pertinent part as follows:

> "Monies deposited in the registry of the court shall be deposited in interest-bearing certificates . . . *All interest accruing from monies deposited shall be deemed income of the office of the clerk of the circuit court . . .*" (§28.33 *Official Florida Statutes,* 1977, at page 162, emphasis added.) (The unabridged text of the statute appears verbatim as Appendix B to this brief and is appended hereto.)

Appellant Webbs argues that the appropriation of interest earned on private monies held in the Court Registry constitutes (a) a denial of due process, (b) a taking of property without just compensation, (c) a denial of the law's equal protection and (d) a legislative invasion into the sole realm of the judiciary. In the process of making such arguments, Webbs also asserts the statute is infirm in that it creates a tax upon use of and access to the Courts.

This Court has jurisdiction hereof pursuant to 28 U.S.C.A. §1257(2).

REFERENCE TO SEPARATE APPENDIX

Citations to the Separate Appendix filed in this Supreme Court in connection herewith appear, for example, as "1a," "2a," "3a," etc.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

This appeal involves §28.33 Official Florida Statutes, 1977, the text of which is, as previously indicated, set out verbatim as Appendix B hereto.

Webbs places heavy reliance herein on the United States Constitution, Amendment 5, which provides in pertinent part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall any private property be taken for public use, without just compensation."

Webbs also relies upon United States Constitution, Amendment 14. This provision provides in part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Also involved is Article IV, §4 of the United States Constitution which provides in pertinent part:

> "The United States shall guarantee to every State in this Union a Republican Form of Government. . ."

Webbs contends this United States Constitution provision should be read in conjunction with clause one of Article IV, §2 thereof which provides:

> "The Citzens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

The record below, taken as a whole, reveals that in addition to the foregoing, the Florida Supreme Court had before it the comparable State Constitutional provisions as embodied in the Constitution of the State of Florida (approved November 5, 1968, effective January 7, 1969, as amended) including:

> "All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property. . ." Florida Constitution, Article I, §2.

> "No person shall be deprived of life, liberty or property without due process of law . . ." Florida Constitution, Article I, §9.

> "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." Florida Constitution, Article I, §21.

> "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch

> shall exercise any powers appertaining to either of the other branches unless expressly provided herein." Florida Constitution, Article II, §3.
>
> "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner. . ." Florida Constitution, Article X, §6(a).

In addition, Appellant Webbs relies upon the common law, having cited to the Florida Supreme Court the Magna Charta (or the Great Charter of King John) granted at Runnymede on June 15, 1215. That ancient document provides:

> "§40. To none will we sell, to none will we deny, or delay, right or justice."

It is this provision of both ancient and common law, taken with others similarly appearing in the Magna Charta and elsewhere, which we have paraphrased into the great underlying principle of American law to the effect that all Courts shall be open to all, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice shall be administered without sale, denial or delay.

QUESTION PRESENTED

The following question, including every subsidiary question fairly comprised therein, is presented by this appeal:

> Does a state statute, which provides that all interest earned upon funds held in the Registry of Court automatically becomes public money, violate the Fifth and Fourteenth Amendments to the

United States Constitution, as well as Article IV, §4 thereof?

SYNOPSIS OF THE CASE

This case challenges the Constitutionality of Florida Statute, §28.33 which provides that as to Florida Court Registries "All interest accruing from monies deposited shall be deemed income of the office of the clerk of the circuit court . . ."

The instant controversy arose when, pursuant to the bulk sales provisions of the Uniform Commercial Code, the purchaser (Eckerd's) of the assets of a business (Webbs) paid the purchase price proceeds for the business assets (nearly two million dollars) into the Court Registry (administered by Beckwith) because claims of creditors against Webbs exceeded the price Eckerd's had agreed to pay for the assets.

From the inception of this case, the trial Court specifically reserved judgment on the rightful party(s) entitled to the interest earned on the nearly two million dollar fund. Clerk Beckwith, representing the interests of Seminole County, Florida, in this appeal, has been paid a small percentage of the total fund placed with him (slightly more than one-half percent or somewhat less than $10,000) for holding the fund. This percentage fee, prescribed by §28.24, Official Florida Statutes, 1977 at page 160, is not an issue here. In fact, Webbs maintains this percentage fee is the only charge to which the Clerk is justly entitled.

The trial Court dealt with the Constitutional arguments and found the subject statute Constitutionally infirm. The

Florida Supreme Court reversed. Appeal was timely taken to this Supreme Court.

The position of the Florida Supreme Court is that "There is no unconstitutional taking because interest earned on the clerk of the circuit court's registry account is not private property." *Beckwith,* supra at page 953. See also Appendix A hereto.

Appellant Webbs maintains that the interest earned on the Registry account is private property accruing to the benefit of those ultimately found entitled to the principal sum on deposit. *Branch v. United States,* 100 U.S. 673, 25 L.ed. 759 (1880); *Coudert v. United States,* 175 U.S. 178, 20 Sup.Ct. 56, 44 L.Ed. 122 (1899). Appellant argues that under the circumstances, this use of private property to produce income for public purposes is an unconstitutional appropriation of rights in such private property. *Talcott v. Allahabad Bank, Ltd.,* 444 F.2d 451 (C.A.5th Cir., 1971); *United States v. 15.3 Acres of Land,* 158 F.Supp. 122 (M.D. Pa., 1957).

In simplest terms, Appellant contends that under the foregoing facts, the use of private property (in this case money) to produce income for government constitutes a taking in contravention of law. The situation is exacerbated here because the Courts are utilized as the mechanism to effect the expropriation, which is essentially a tax since it has no relationship to the services rendered in exchange for the charge.

STATEMENT OF THE CASE

This proceeding commenced as an interpleader action brought pursuant to Chapter 676, Official Florida Statutes, 1977. The real parties in interest here (as Appellants)

are some nearly two hundred creditors of Webbs Fabulous Pharmacies, Inc., a now defunct business. The interests of these creditors are represented here by the Court-appointed Receiver for Webbs assets.

In February, 1976, Eckerd's of College Park, Inc., (Eckerd's), purchased most of the assets of Webbs Fabulous Pharmacies, Inc., (Webbs). The sale was effected during a period of grave financial difficulty for Webbs. Thus, at "closing," Webbs debts appeared to be greater than the purchase price. In fact, Webbs debts proved to exceed the purchase price by many hundreds of thousands of dollars.

Consequently, Eckerd's proceeded to effect the closing pursuant to a portion of the Uniform Commercial Code commonly called the "Bulk Sales Act" (Chapter 676, Official Florida Statutes, 1977). This necessitated (made legally mandatory) that Eckerd's pay the purchase money proceeds into the Circuit Court Registry pursuant to an Interpleader Complaint. Therafter, Webbs creditors would have no choice but to look to the Court and the interpleaded funds for their money. This process of determining which claimants against the fund were entitled to share in it, and if entitled then to what extent, would ultimately take nearly three years.

Eckerd's filed its Complaint for Interpleader on February 27, 1976, asking in part that the "Court enter an order permitting Eckerd to pay into this Court the sum of $1,812,145.77" and requiring creditors "to file their claims with this Court and to interplead and settle between themselves their rights and claims to the monies deposited herein." (R. 4 & 5).

The Circuit (trial) Court entered a "Final Order of Interpleader" on June 15, 1976, (1a-3a), but directed

Eckerd's to hold the funds "IN CUSTODIA LEGIS." The Circuit Court would later order the funds paid into its Registry.

When the latter action was taken on July 12, 1976, the Circuit Court had apparently already learned that the Clerk of Court (Beckwith) and through him Seminole County, Florida's general revenue fund (Seminole), claimed entitlement to all income earned upon monies placed in the Court Registry *in addition* to a statutory fee of one (1%) percent on the first $500.00 and one-half (1/2%) percent of the balance of all funds so placed with the Clerk. These statutory one percent and one-half percent charges, collected pursuant to §28.24, Official Florida Statutes, supra, are not at issue here. Appellants do contend, however, that the very existence of these fees, and the fact that they were collected in this case, does enhance Appellants' arguments.

Ultimately, when the Circuit Court ordered the funds paid into its Registry, it then and there declared:

> ". . . The Court reserves ruling over the issue of whether the interest earned on the fund invested by the Clerk . . . shall accrue to the benefit of the creditors of Webb's Fabulous Pharmacies, and the transfer to and investment by the Clerk. . . shall be wholly without prejudice to the claim of the creditors to the earnings from the invested funds and the Clerk of the Circuit Court shall not, by reason of the receipt of said funds or the earnings thereon have any greater claim thereto than before such receipt." (4a-5a).

The very next day following the entry of this Order the funds were deposited with Clerk Beckwith. (6a).

The issue of entitlement to the accruing and compounding interest apparently continued to simmer. Despite the need to resolve matters more germaine to the case (matters which ultimately consumed most of the twenty-four Circuit Court files in this cause), the controversy with the Clerk was not forgotten. Eventually, largely in response to the insistence of Beckwith and Seminole that the county was utlimately entitled to all interest earned on the interpleaded moneys, the Circuit Court "(u)pon the Court's own motion and in exercise of the Court's inherent power and jurisdiction" appointed a Receiver to hold and invest the interpleader fund "on behalf of the creditors," thereby insuring that all interest thereafter accruing would inure to the benefit of the creditors. (7a-10a).

Subsequently the Receiver took custody of the interpleader fund previously held by Beckwith, exclusive of the interest thereon which Beckwith continued to hold. As to such arrangement, the Circuit Court specifically declared:

> "The Court reserves ruling upon the rightful party entitled to the accrued interest earned upon the interpleader funds and therefore directs the Clerk to hold such sums in the Registry of the Court, in interest bearing accounts or certificates, until the Court makes a determination as to the same." (14a).

On August 26, 1977, the Circuit Court in response to the Receiver's Motion for Assistance and Instructions (16a-19a), advised that the "Receiver shall institute and the Court will consider entertaining a Motion in the present proceeding for an Order directing the Clerk of this Court to remit to the Receiver the sum of approximately Ninety One Thousand ($91,000.00) Dollars which sum constitutes

all interest earned upon the interpleader fund while the same remained in the Clerk of this Court's custody." (21a). The Circuit Court went on to note that the Clerk asserted his right in these funds pursuant to Florida Statute, §28.33.

The Receiver then filed a "Motion for Direction to Clerk to Remit Certain Monies to Receiver." He asserted in the motion that the subject moneys were not "public monies" by operation of Florida Statute, §28.33. (22a-24a). This motion was subsequently withdrawn before it was argued; in withdrawing the motion the Receiver advised the Court he anticipated "a lengthier speaking motion on the same subject matter, wherein constitutional issues will be raised with specificity, will be filed with the Court in the near future." (25a). The lengthier speaking motion did, in fact, follow. (26a-32a). It raised a series of Constitutional and other problems with the Clerk's retention of interest accrued upon the interpleader moneys including, but not limited to, the following:

(a) the statute, as interpreted by the Clerk, effected a "taking of private property without due process of law";

(b) the statute, as interpreted by the Clerk, constituted "an invasion of the realm of the Judiciary by the Legislature";

(c) the statute, as relied upon and interpreted by the Clerk, was unconstitutionally vague; and,

(d) the statute, as applied by the Clerk, deprived citizens of equal protection under law.

The argument that the statute took property without just compensation was a common thread running both im-

plicitly and explicitly through all of the foregoing. Additionally, in a supplementary pleading filed before the then pending motion was considered by the Court, the Receiver added another Constitutional ground to his challenge:

> (e) the retention of the interest earned on the receivership fund constituted an illegal and unconstitutional tax wherein the Court was compelled to act as a tax-producing agency. (33a-34a).

Having raised these arguments in his motion and supplement the Receiver thereafter filed a detailed memorandum of law. In this memorandum he argued these and various other Constitutional issues at length to the trial Court. (R. 72-R. 100). The Receiver pointedly maintained in his memorandum that the retention of interest by the Clerk offended due process, constituted a tax upon access to the Courts, was clearly a taking of property without just compensation, violated the separation of powers doctrine and was fatally vague.

The Clerk responded to these arguments in his trial Court level memorandum. (R. 112-R. 122). The Receiver in turn responded to the Clerk's memorandum in a Receiver's reply memorandum. (R. 123-R. 132). Presumably all this served to elucidate the Constitutional issues before the trial Court which also heard oral argument from the parties.

In response to the memoranda and arguments, the Circuit Court declared on July 24, 1978, that it was:

> "Ordered and Adjudged that the Clerk of this Court is not entitled to any interest earned, accrued or received on monies deposited in the registry of this Court . . . the creditors herein are

> the rightful parties entitled to all such interest earned on the interpleader fund while it is held by the Clerk of this Court." (34a-35a).

This Order was subsequently both amended and supplemented after the Receiver moved for a "Nunc Pro Tunc Order" on the grounds that he had "asserted that Florida Statute, §28.33 is unconstitutional for a number of reasons, including that it directs the taking of private property without due process of law, that it violates the constitutional separation of powers between the legislative and judicial branches, and that it provides for an unconstitutional tax." (36a-39a). In response the trial Court amended its Order of July 24, 1978, on August 23, 1978, to provide "nunc pro tunc":

> "Ordered and Adjudged that Florida Statute, §28.33 and Laws of Florida, Chapter 73-282, are unconstitutional to the extent that the provisions thereof pertain to private monies held in the registry of the court in pending litigation and specifically to those monies held in the registry of the Court in this case." (40a-41a).

Chapter 73-282, Laws of Florida, is essentially the same as §28.33, Official Florida Statutes, 1977.

There followed an appeal directly to the Supreme Court of the State of Florida. The State Supreme Court reversed the trial judge, declining to explain its reasoning, except in the most general terms, despite extensive briefing and argument before it raising the same issues argued both here and at the trial level. Thus the Supreme Court of Florida observed:

> "We begin our analysis by reviewing rules of law so well established as not to require citation. . ."

> "Inherent in the trial judge's ruling is a finding that interest earned is the private property of the person ultimately receiving the principal. This proposition rests on the underlying premise that the principal remains private when deposited in the clerk's registry. Neither the premise nor the conclusion withstands close analysis . . ."
>
> "There is no unconstitutional taking because interest earned on the clerk of the circuit court's registry account is not private property." (See *Beckwith,* supra at 952 and 953, and Appendix A hereto.)

One Florida Supreme Court Justice dissented in part from this reasoning with an opinion.

A timely direct appeal was taken to this Supreme Court on December 31, 1979. Probable jurisdiction was noted here on March 17, 1980. A single appendix has been designated and is being filed with this Court. This brief is filed timely.

SUMMARY OF ARGUMENT

Appellant argues the appropriation of interest earned on private monies held in the Court Registry is a denial of due process, a taking without just compensation violative of equal protection precepts and an act legislatively mandated in violation of the separation of powers doctrine. Appellant also asserts the statute creates an inherently unconstitutional tax upon use of and access to the Courts.

Citing *Himely v. Rose,* 5 Cranch 313, 3 L.ed. 111 (1809), Appellant begins its argument with the proposition that "In equity, interest goes with the principal as the fruit with the tree." Appellant continues by citing ample Federal

precedents to the effect that fees and emoluments collected by a Clerk of Court and deposited at interest are not public moneys. *Coudert v. United States,* 175 U.S. 178, 20 Sup. Ct.56, 44 L.ed.122 (1899); *Branch v. United States,* 100 U.S. 673, 25 L.ed. 759 (1880).

Appellant also urges that the Federal Courts presently follow the rule Appellant sought to make incumbant in Florida but which the Florida Supreme Court rejected. The rule provides that private moneys do not change in character to public funds upon their deposit in Court. *Talcott v. Allahabad Bank, Ltd.,* 444 F.2d 451 (C.A. 5th Cir., 1971).

Contending that the expropriation of all interest by government from the Court Registry, which the Clerk here seeks to effect, is a tax upon use of and access to the Courts, Appellant argues that this Court should strike the tax as a clog upon the judicial system. *Life & Casualty Insurance Co. v. McCray,* 291 U.S. 566, 54 Sup.Ct. 482, 78 L.ed.987 (1934). Further, it is argued that such an exaction is an abrogation of the rights of citizens of the United States since it puts a tax upon use of and access to the Courts. Such use and access is an implicit right of citizenship and while under the law of Florida a small fee for the use of the Court Registry may validly be imposed, Appellant maintains retention of all interest earned on private moneys can only be deemed a tax because the exaction is a forced contribution to meet the public needs of government and is not a charge reasonably related to the cost of services rendered in return. The fact that the Clerk in Florida receives a small fee in addition to all the interest makes the situation even more grievous.

These actions offend not only our Federal Constitution but the common law and the Magna Charta. Further,

it is for this Court to determine if the tax as here applied affects Constitutional rights. *Storaasli v. State of Minnesota,* 283 U.S. 57, 51 Sup.Ct. 354, 75 L.ed. 839 (1931).

Then, while conceding that because this next argument is novel it is precedentially weak, Appellant suggests that by making the Courts tax collectors and in compelling them to utilize their Registries in legislatively mandated fashions, the Florida Legislature has offended Article IV, §4 of the United States Constitution. This is so, says Appellant, because the separation of powers doctrine is mandated by the Federal Constitution and guaranteed to the states and their citizens by the national government. *VanSickle v. Shanahan,* 511 P.2d 233 (Sup. Ct. Kan., 1973).

Appellant concludes that significant Federal questions are raised in this proceeding. Urging that the states have almost unanimously concluded that to permit interest on Registry funds to accrue to the account of government is wrong, Appellant states that such a result is "untenable so long as private property is constitutionally protected." *Sellers v. Harris County,* 483 S.W.2d 242 at 243 (Sup.Ct. Tex., 1972). To like effect, Appellant says are many other decisions including, for example, *McMillan v. Robeson County,* 137 S.E.2d 105 (Sup.Ct. N.C., 1964). Appellant sums up in these words:

> "The earnings on the fund are a mere incident of ownership of the fund itself. The constitutional provision. . . that no person shall be deprived of his property 'by law of the land,' applies to the earnings in the same manner and with the same force as it applies to principal." *McMillan,* supra at 108.

ARGUMENT

Introduction:

The Florida Supreme Court began its decision in this cause by alluding to but not defining what it said were "rules of law so well established as not to require citation." *Beckwith,* supra at 952; see also Appendix A hereto. The State Supreme Court rested its decision in the action at hand on the legal king-pin that private moneys deposited in a Court Registry became public moneys immediately upon their deposit into Court.

In the Florida Supreme Court's own words, "these funds are considered 'public money' from the time they are deposited in the general registry of the court to the time they leave the account." Therefore, logic dictates that argument in this brief proceed initially with a head-on analysis of this decision of the Florida Supreme Court which appears at 374 So.2d 951 and as Appendix A hereto. That decision can be shown to be so poorly reasoned and so unreasonable as not to pass either general legal or logical muster, let alone Constitutional scrutiny. Once convinced of the first two of these three problems, the Supreme Court of the United States may more readily proceed to determine if a decision contrary to that of the State High Court must be reached as a matter of Constitutional law and simple logic.

Certainly, when this Court fully considers the issue now before it, this Supreme Court will be compelled to find that the use of private money, paid into a state Court Registry, to produce general revenue for government, is a taking of private property in contravention of basic Constitutional precepts "so well established as not to require citation." Stated another way, a state statute which pro-

vides that all interest earned upon private funds temporarily held in Registry of Court becomes county (public) money, violates the Constitutional rights of citizens of the United States.

We therefore begin by examining the Florida Supreme Court's dual premise and conclusion that, by operation of statute, moneys paid into the Registry of Florida Courts instantaneously change in character from private to public funds upon their delivery into safekeeping. Our anlaysis proceeds with the caveat that in this case the trial Court knew of this theory from the start and declined to accept the funds without *first* specifically reserving jurisdiction on the point – so as not to prejudice the rights of the private litigants represented here as "Webbs." (4a-5a).

The Federal View:

The controlling principal in this case is startling in its simplicity. It was stated long ago by a Justice of this Court in hardly more than a dozen words:

> "In equity, interest goes with the principal as the fruit with the tree." Justice Johnson in *Himely v. Rose,* 5 Cranch 313, 3 L.ed. 111 (1809).

Questions very similar to the one presented on this appeal have previously been answered by this Court. Those answers lend credence to Appellant Webbs' position.

In *Coudert v. United States,* 175 U.S. 178, 20 Sup.Ct. 56, 44 L.ed. 122 (1899), this Court was faced with a claim against the Federal Government for loss of private moneys deposited by a marshall in a national bank which was a designated depository of public money. The moneys deposited represented the proceeds of the sale of a vessel seized and sold during the Civil War as a blockade runner.

The owner of the vessel, (actually his estate, the vessel's owner being long deceased) was subsequently determined entitled to the proceeds of the sale. Unfortunately for the estate, the bank wherein the money was being held by order of Court failed before the estate could be justly compensated by means of payment of such moneys to it. Thus arose the issue of whether or not the funds so held and deposited were "public moneys" within the meaning of applicable statutes. Had the moneys been "public" while they were being so held, the government would have been liable for their loss. The claimant asserted that the funds were virtually in the Treasury of the United States and were subject, as public moneys are subject, to the use of the United States and that therefore a debtor/creditor relationship existed between the ultimate private owner(s) of the fund and the United States. This Court did not agree:

> "By the seizure of the [vessel] Teresita the title to her did not change nor did the title to the proceeds of her sale, *pendente lite.* That awaited adjudication, and whatever relations to such proceeds or responsibility for them the United States might have assumed if they had been deposited with an assistant treasurer, they did not become public money and subject to the statutes applicable to public money, and authorized to be deposited in a public depository." *Coudert,* supra at 183, emphasis supplied.

To like effect is an earlier case styled *Branch v. United States,* 100 U.S. 673, 25 L.ed. 759 (1880). In *Branch* certain cotton was seized under the (wartime) confiscation act. The cotton was sold during the progress of a suit for its condemnation. By order of the Court, the proceeds were deposited by the Clerk to await the further order of

the Court in the First National Bank of Selma, Alabama. This was done upon a notification of the Secretary of the Interior that such bank had been designated by the Secretary of the Treasury as a depository of public money. Pending the suit the bank failed. In the proceedings for winding up its affairs a dividend upon the deposit was paid to the Court, and then by order paid over to the claimants. A suit was brought against the United States for the balance of the original deposit upon the ground that the Selma bank was at the time of the deposit a designated depositary of public money and was part of the Treasury of the United States, and that consequently a deposit in it was a payment into the Treasury of the United States, binding the latter to its return. The proceedings here were disposed of in an opinion by Mr. Justice Waite. He said:

> "The position assumed by the appellants is to our minds wholly untenable. The designated depositaries are intended as places for the deposit of the public moneys of the United States; that is to say, moneys belonging to the United States. No officer of the United States can charge the government with liability for moneys in his hands not public moneys by depositing them to his own credit in a bank designated as a depositary. In this case, the money deposited belonged for the time being to the court, and was held as a trust fund pending the litigation. The United States claimed it, but their claim was contested. So long as this contest remained undecided, the officers of the Treasury could not control the fund. Although deposited with a bank that was a designated depositary, it was not paid into the Treasury. No one could withdraw it except the court or the clerk, and it was held for the

> benefit of whomsoever in the end it should be found to belong." *Branch,* supra at 674.

For further commentary to like effect see *United States v. McMillan,* 253 U.S. 195, 40 Sup.Ct. 540, 64 L.ed. 857 (1920); *United States v. Mason,* 218 U.S. 517, 31 Sup.Ct. 28, 54 L.ed. 1133 (1910).

In this connection it is of more than passing interest to note several aspects of Florida law; the similarity of these aspects of State law to their Federal counterparts makes the Supreme Court of Florida's decision in this cause ever more suspect.

First, the Clerk in Florida has no personal liability for loss of the principal sum held by him. It is the law of Florida that, as a general rule, the payment of money into Court passes the title to the money so paid irrevocably to the party for whom it is tendered. *Masser, et al. v. London Operating Co.,* 145 So. 72 (Sup.Ct. Fla., 1932). Thus, the Supreme Court of Florida has held that should there be any loss once the money or property is tendered to and deposited in the Court Registry (as, for example, specifically in case of bank failure), the loss must fall on the litigant(s) to whom title passes or for whose benefit the payment was tendered. The Florida State Court Clerk, like his Federal counterpart, has no liability for loss of the fund. This holding was made specifically in a Florida case where Court Registry moneys were lost when the bank in which they were placed collapsed. In that case it was stated:

> "The rule is well settled that, when a party litigant, pursuant to court order, pays into the registry of the court as an unconditional tender a sum of money which he contends is due by him

> to his adversary litigant in a cause pending between them, the title to the sum passes irrevocably to the adversary though he does not accept it until the conclusion of the litigation or at some other time. If subsequent to payment into court or recognition by the court the sum is lost or stolen, the loss must fall on the litigant to whom title passes or for whose benefit it was tendered. The tender in other words becomes a fund in custodia legis subject to the order of the court or the pleasure of the depositee." *Phipps et al. v. Watson,* 147 So. 234 at 235 (Sup. Ct. Fla., 1933) citing extensive authorities.

For further Florida authority to like effect see also *Mordt v. Robinson,* 156 So. 535 (Sup.Ct. Fla., 1934).

Second, the very statute here challenged limits the Florida Clerk's liability. It provides in part that "No clerk investing such funds shall be liable for the loss of any interest when circumstances require the withdrawal of funds placed in a time deposit and needed for immediate payment of county obligations." §28.33, Official Florida Statutes, 1977.

Third, there are ample mechanisms under Florida Law to absolve the Clerk from any residual or arguable liability which he might possibly have. See Chapter 136, §69.031, etc., Official Florida Statutes, 1977.

These similarities to the Federal law bear consideration. They are helpful in reading the Federal cases where the law seems clear and where there is overwhelming authority in support of Appellant Webbs' arguments.

The United States Court of Appeals for the Fifth Circuit recently faced an analogous fact situation to the one

presented here. In *Murphy v. Travelers Insurance Company,* 534 F.2d 1155 (1976) that Court handled an action by a widow, as named insured, against a life insurer, where the insurer filed a claim of interpleader. While dealing with numerous other issues in *Murphy,* the Court applied and approved of the (leading) Texas rule governing the accrual of interest in interpleader matters. The Court stated that "Once a stakeholder makes an unconditional offer to give up possession of a disputed fund, it ceases to exert that dominion over the money sufficient to justify an obligation to pay interest thereon, and the rule is that once such unconditional tender is made any liability for interest [paid by the stakeholder] ceases as of the date of tender." *Murphy,* supra at 1165. Interest earned on the fund after the tender is made goes with the principal. This is so because the Fifth Circuit also remarked in *Murphy* that following the deposit of funds into the Court Registry they became the property of the claimant ultimately determined to be entitled thereto.

Even more helpful to Webb's position here is *Talcott v. Allahabad Bank, Ltd.,* another Fifth Circuit Court of Appeals case appearing at 444 F.2d 451 (1971). This case, too, was an interpleader action. It was first heard at trial before the United States District Court sitting at Savannah, Georgia. In *Talcott,* Judge Thornberry, speaking for the Fifth Circuit, addressed the question of interest on the interpleader fund with specificity. He noted that the trial Court had ordered the Clerk of the Court to pay out to the victorious claimants all the funds deposited in the Registry of the Court including the interest that had been earned on the fund. While a party to the proceeding opposed the award of such interest, Judge Thornberry remarked simply that "We see no merit whatever to . . . argument on this point. There is no reason why interest accruing on a con-

tested fund during litigation over the fund should not be awarded to the winner of the fund." *Talcott,* at 463.

To like effect are cases from other circuits. Thus, it is remarked in *Brooks & Woodington, Inc.,* an appeal in a bankruptcy proceeding:

> "There has been an informal indication that the assets here involved have been invested in interest-bearing securities or an interest-bearing account pending the outcome of this appeal. If this is indeed the fact, we recognize the existence of some equities for the allowance of interest. In general, where a fund in litigation is deposited in court, interest may be recoverable to the extent that the fund earns interest during such time. 47 C.J.S. Interest §54." *Brooks & Woodington, Inc.,* 505 F.2d 794 at 799 (C.A. 7th Cir., 1974).

Similarly, the various Federal Courts of Appeals have repeatedly held that the payment of money into the Court Registry does not deprive litigants of their ownership rights therein. Rather, the Courts are said to hold the moneys merely as trustees for the rightful owners. *Baxter v. United Forest Products, Co., Inc.,* 406 F.2d 1120 (C.A. 8th Cir., 1969).

It is proper that such moneys be placed in an interest bearing account where they may earn interest at the highest current rate; this is in accord with normal practice, especially where the parties have agreed to such action. Interest accrues to the victorious claimant(s). *Prudential Insurance Company of America v. King,* 308 F.Supp. 1143 (W.D., Mo., 1969).

The conclusion that the funds remain private when deposited with the Clerk, uniformly reached by the Fed-

eral Courts, is of course at variance with the conclusion of the Florida Supreme Court below that the principal sum becomes public property while deposited with the Clerk and that "these funds are considered 'public money' from the time they are deposited in the general registry of the court to the time they leave the account." See *Beckwith,* supra, at 952 and Appendix A hereto.

Again and again the Federal Courts have said such moneys are property not of any government but of the claimant. See *United States v. Dunnington,* 146 U.S. 338, 13 Sup.Ct. 79, 36 L.ed 996 (1892); *Chatham & Phenix Nat. Bank of City of New York, v. Guaranty Trust Co. of New York/Kingdom of Roumania v. Same,* 256 F.90 (C.A. 2nd Cir., 1919); *In Re Moneys Deposited, etc.,* 243 F.2d 443 (C.A. 3rd Cir., 1957); *United States v. 15.3 Acres of Land,* 158 F.Supp. 122 (M.D., Pa., 1957); *Federal Home Loan Bank v. Long Beach Fed. S & L Assn.,* 122 F.Supp. 401 (S.D. Ca., 1954). Cf. *United States v. MacMillan,* 253 U.S. 195, 40 Sup.Ct. 540, 64 L.ed. 857 (1920); *United States v. Mason,* 218 U.S. 517, 31 Sup.Ct. 28, 54 L.ed. 1133 (1910).

Finally, it seems appropriate to consider the operative rules of court. The Federal Rules of Civil Procedure governing Registry deposits are essentially identical to their Florida counterparts. (See F.R. Civ. P. 67; Fla. R.Civ.P., 1.600). In fact, the "committee notes" to the Florida Rule observe that it (the Florida Rule) "is Federal Rule 67 and provides for deposits in court." In other words, Florida appropriated the Federal Rule as its own, word for word. The Florida Rule, like its Federal counterpart, provides that "Money paid into court under this rule shall be deposited and withdrawn by order of court." In so doing the committee notes say the rule "merely declares the law of Florida set out in *Phipps, et al. v. Watson,* 147

So.234, as that case relates to procedure." See West's Florida Statutes Annotated, Rules, Vol. 31, for full text of both the Florida Rule and Committee Note at page 262 (1967). As to the Federal (companion) rule, this Court long ago observed:

> "The question of the liability of the clerk to pay interest to litigants on money deposited by them is in a large degree, covered by the rules of court . . . which permit . . . an application of a litigant to the court to direct the allowance of such interest and to provide for its payment by the clerk when the request is granted." *U.S. v. MacMillan,* supra at 205.

Thus, this Court has previously recognized authority over judicial Registries as part of inherent (equitable) judicial powers. The same can fairly be said to be the case in Florida, the Federal and Florida Rules being essentially identical for purposes of this case.

Consequently, the issue remaining before this Supreme Court seems further reduced in scope. It comes down to one of whether or not the principle followed at the Federal level, where the underlying law is essentially the same as state law in Florida, is a principle based in a Constitutional imperative or some other source. If it is Constitutionally imperative that interest earned on registry moneys must be paid to victorious litigants rather than government authority, the decision of the Florida Supreme Court below must fall.

Somewhat surprisingly, the reason behind the rule followed at the Federal level, which Appellant Webbs seeks to make mandatory upon the State of Florida, is explained best in numerous and diverse state court decisions and not in the Federal cases.

The Majority State View:

The vast majority of states which have judicially considered the issue now at hand have concluded that it is constitutionally imperative that interest earned on Court Registry funds ultimately accrue to the owner of the principal sum – and not to some account of government.

Thus, Appellant Webbs has maintained throughout the course of this litigation that the fatal flaw in Clerk Beckwith's position, even as adopted by the Florida Supreme Court, is that it totally fails to come to grips with the indisputable legal proposition that interest earned on a fund deposited to abide the result of litigation is merely a natural increment to the principal fund, becomes a part thereof and belongs to the litigant ultimately determined to be the owner of the principal. Webbs steadfastly maintains that this is a simple basic property right guaranteed to citizens of the United States. 5th and 14th Amendments, United States Constitution.

The foregoing proposition was recognized, acknowledged and endorsed in the leading American case on this point, *Sellers v. Harris County,* 483 S.W. 2d 242 (Sup.Ct., Tex., 1972). That state court decision was, in turn, viewed with approval in *Murphy v. Travelers Insurance Company,* the Fifth Circuit case already discussed. *Sellers* was briefed and argued at length to the Supreme Court of Florida.

In *Sellers v. Harris County,* supra, the Supreme Court of Texas was confronted with a fact situation very much like the one here. North American Insurance Company there interpleaded a One Million ($1,000,000.00) Dollar life insurance policy (half as much as is involved in the case at Bar), and paid the same into the Registry of the Court, because the proper beneficiary of such fund was in

dispute. The sizeable principal brought a return of some Six Thousand ($6,000.00) Dollars per month since the trial Judge directed the handling of the money in a manner to assure that the victor would receive interest. At the conclusion of the litigation the trial Judge was to determine a reasonable fee for the County (Court Clerk) as compensation for accounting and administration expenses incurred in handling the fund. [Unlike Florida, the Texas County (Court Clerk) was not also entitled to a statutory "service charge" for "services rendered" such as the one of $9,228.74 paid the Clerk in this case (R. 44-46) without argument pursuant to §28.24 (14), Official Florida Statutes, 1977)].

In the Texas case, as in this case, the County (Court Clerk) claimed express statutory authority to retain the interest. The Texas Court described this claim as follows:

> "The contention by Harris County that it is entitled to all of the interest is based on the terms of Articles 1656a and 2558a, Vernon's Ann. Civ. Stats. Article 1656a is a general direction to the county auditor as to the accounting system and the handling of money collected by officers of the county. Such money is to be deposited in the county depository to draw interest for the benefit of the county. Article 2558a is a comprehensive statute setting procedure and liability in the handling of trust funds in the possession of county and district clerks. It makes the county liable if funds on deposit with its designated depository are lost. The clerk is relieved of responsibility for the safekeeping of the funds so long as they are deposited in the legally selected depository. Sections 4a and 4b of Article 2558a direct the commissioners court of the county to receive the in-

> terest earned on the trust fund and to place that interest in the general fund of the county as an offset to the expenses of handling such trust funds for the benefit of litigants." *Sellers,* supra, at 243.

The Texas Court refused to accept Harris County's argument and noted that "these funds are not owned by the county but are only held in trust for the litigant who establishes his right thereto . . . The interest earned by deposit of money owned by the parties to the lawsuit is an increment that accrues to that money and to its owners." *Sellers,* at 243.

Noting that under the Texas statute (as is presently the case under the challenged Florida Statute) all interest is taken from its owner and given to the county without any consideration to the benefit to the owner or the expense to the county, the Court observed that "if the litigation lasts as long as some lawsuits do, the county will profit enormously. The result is untenable so long as private property is constitutionally protected." *Sellers,* at 243.

Consequently, the Court struck down the Texas statute which, like Florida's, was not reasonably related to the value of the county's services in safeguarding and investing the principal. It was therefore deemed offensive to the due process and other clauses of both State and Federal Constitutions. In so doing the Texas Court spoke not only to the State Constitution and case law, but looked to the Federal Constitution and a decision of this United States Supreme Court as well when it commented:

> "By depriving the owner of a sum not reasonably related to the value of the county's services in safeguarding and investing the principal, the statute offends Article 1, Section 19 of the Texas

> Constitution, Vernon's Ann.St. as well as the Fourteenth Amendment of the United States Constitution. *Myles Salt Co. v. Board of Commissioners,* 239 U.S. 478, 36 S.Ct. 204, 60 L.ed. 392 (1916)." *Sellers,* supra at 244.

Another leading state case in this area which squarely addresses the Constitutional issues raised on this appeal is *McMillan v. Robeson County,* 137 S.E.2d 105 (Sup.Ct. N.C., 1964). In *McMillan* the Supreme Court of North Carolina dealt with a statute requiring state court clerks to account for and to pay over to the general county fund income received on private moneys held by such clerks under color of office. Citing ample authorities, including decisions of this Supreme Court, the North Carolina Court pointedly observed:

> "The earnings on the fund are a mere incident of ownership of the fund itself. The constitutional provision . . . that no person shall be deprived of his property 'by law of the land,' applies to the earnings in the same manner, and with the same force, it applies to principal."
>
> * * *
>
> " 'The law of the land' and 'due process of law' provisions of the North Carolina and U.S. Constitution require notice and an opportunity to be heard before a citzien may be deprived of his property." *McMillan,* supra, at 108.

Perhaps one of the most persuasive opinions in the area comes out of Nebraska where under the facts of the case which was at Bar, the liability of the officer who was entrusted with the funds was that of an insurer. This strict liability theory is discussed elsewhere in this brief. It does not exist under Florida law, thereby making the Nebraska

theory even stronger under the facts of the Florida case now before this Court. (See *Masser v. London Operating Co.* and *Mordt v. Robinson,* supra, for the proposition that in Florida the Clerk is without liability for loss of Registry funds.) In any event, the Nebraska Court acknowledged the strict liability of the officer for loss of moneys received by him. The Court noted that there are jurisdictions wherein the courts hold that if the officer is strictly liable for the money received by him he thereby becomes, in effect, the owner thereof and as the owner is entitled to keep any interest earned thereon. The Nebraska Court, however, rejected the view that in such circumstances the officer is entitled to the interest. Stating that the true test is not whether the officer is liable to account, but whether the officer is the owner of the funds placed in his hands, the Court said:

> " 'Once settled clearly and definitely whose money the principal sum was, the interest necessarily belongs to that person as an increment to the principal fund, and to argue to the contrary is simply to lose one's self in a metaphysical fog of sophistry failing to give effect to the central principle of right and justice, making the interest the property of the party who owned the principal sum.' " *Bordy v. Smith et al.,* 34 N.W.2d 331 at 334 (Sup.Ct. Neb., 1948) citing *State v. McFetridge,* 54 N.W. 1 at 11 (Sup.Ct. Wisc., 1893).

The proposition that a public officer having custody of private funds cannot keep as income of his office the earnings thereon enjoys judicial precedent of long standing. It may properly be stressed this is particularly true where, as in Florida, the Clerk has no personal liability for loss of the principal sum, provided he places the funds in com-

pliance with applicable law. See *Simons v. City of Jackson,* 63 Tex. 428 (Sup.Ct. Tex., 1885); *Lawson v. Baker,* 220 S.W. 260 (Ct. Civ. App. Tex., 1920, error ref'd.); *McFetridge,* supra; *Pomona City District v. Payne,* 50 P.2d 822 (C.A. Calif., 1925); 26A CJS 484, Deposits in Court, §9; and 5 ALR 2d 250 and cases cited therein. These cases and authorities make it clear that there is a series of long perceived Constitutional problems, all discussed herein, with government retaining all interest earned on moneys held for private parties pending the outcome of litigation. Basically these problems relate to the denial of property rights without affording just compensation and due process of law. That such conclusions are reached seems only natural because in an ultimate sense it is the natural right to be secure in one's property which is at issue here. As to such right, ownership of interest relates back naturally to the time of the initial deposit of the fund into Court. Cf. *Ostly v. Saper,* 305 P.2d 946 (2d DCA Cal., 1957); also *Metropolitan Water District v. Adams,* 197 P.2d 543 (Sup.Ct. Cal., 1948).

Furthermore, at common law and as a matter of policy, it must be said that the trial Court was in the exercise of its inherent Constitutional equity jurisdiction, as recognized by numerous prior judicial decisions, when it attempted to exercise its discretion to direct the handling of funds on deposit in the Court, including their investment at interest, in such way as to best serve the interests of justice, the Court and the litigants. To allow the interpleader deposit, in this case almost Two Million ($2,000,000.00) Dollars, to languish in an iron safe, or otherwise, without drawing interest for the concerned litigants during the pendency of this cause would be unconscionable. Yet that in effect is what the Clerk would do – for he would ultimately pay the creditors of Webbs even less than was paid into the

Court's Registry for their benefit; keeping for his office and account all interest and a portion of principal, to boot, as a so-called fee. This is shocking. Equally shocking is any other rationale by which the County would be able to appropriate the interest that has and will be earned on the fund during the pendency of this cause. See *McLennan County v. North American National Insurance Co.,* 457 S.W.2d 597 (Ct. Civ. App., Tex., 1970, error ref'd n.r.e.).

It seems only of passing interest then that even in Florida the Clerk is not entitled to a fee on sums paid from the Court Registry to meet a condemnation award. *Sarasota v. Burch,* 192 So.2d 9 (2d D.C.A. Fla., 1966). But this takes on special significance when consideration is given to the lucid opinion of the Supreme Court of South Carolina in a condemnation proceeding analogous to *Sarasota v. Burch,* supra. In *University of South Carolina v. Elliott,* 149 S.E.2d 433 (Sup.Ct. S.C., 1966) the University of South Carolina, upon institution of condemnation proceedings, deposited a sum of money in the Registry of the Court as required by South Carolina law. The condemnation proceedings was thereafter concluded between the condemnor and condemnee, whereby the University of South Carolina was to withdraw the deposit that it had made in the Registry. During the pendency of that litigation, the Clerk of the Court had deposited money at interest and the county thereafter claimed ownership of the interest by reason of a South Carolina statute which provided that all state, county and municipal officers depositing funds at interest shall account to the state, county or municipality, as the case may be, for all such interest collected on the deposits. The Supreme Court of South Carolina held, first, that the general rule is that the interest on funds held in custody pending litigation is

simply an increment to the principal and belongs to the person subsequently declared to be the owner of the principal; second, that a fiduciary should not be allowed to make a profit from funds he holds simply as a custodian. The Court concluded that the Clerk was simply a lawful custodian of the funds and therefore had no right to the interest earned thereon and that the interest should be repaid to the owner of the principal at the conclusion of the litigation. The Court furthermore recognized what is now most significant at this appellate level – that the statutory construction urged by the county would deprive the University of its property without compensation and therefore would run afoul of the Constitutional prohibition against such appropriations. In this connection it is noteworthy that the South Carolina case involved two units of government and no private parties. Nonetheless, the Court acted to protect property rights even of a governmental unit. For further state authorities to like effect see *Southern Oregon Co. v. Gage,* 197 P.276 (Sup.Ct. Or., 1921) where it was expressly declared, in an interpleader action, that where the county placed Court Registry funds in a bank to accrue interest during pending litigation, all such interest on such money belonged to the ultimate owner of the fund and not the County; also see *Potter v. County of Wayne,* 207 N.W.2d 448 (Ct. App. Mich., 1973) where it is said in the dissent "there is no provision of law – statutory or common – authorizing confiscation of interest earned . . ." *Potter,* supra at 457. Further authority for Webbs' position can also be found in *Kierman v. Cleland,* 273 P. 938 (Sup.Ct. Idaho, 1929); *Board of Law Library Trustees of Los Angeles County v. Lowery,* 154 P.2d 719 (Ct. of App. Cal., 1945) and *Drainage Dist. No. 2 of Ada Cty. v. Ada Cty.,* 226 P. 290 (Sup.Ct. Idaho, 1924).

While it must be conceded limited case law to the contrary can be found in some American jurisdictions [Cf. *Locasio v. Rosewell,* 365 N.E.2d 949 (1st Ill. Ct. App., 1977)], those few cases are for the most part predicated upon the strict liability of the Clerk or other officer holding the funds in the event of their loss. In other words, these jurisdictions follow a rule stating that if the funds are lost before delivery to the party ultimately found entitled thereto, the loss rests on the government official holding the funds at the time of their loss. Furthermore, such cases are generally silent as to any and all Constitutional considerations. Other cases which fail to follow the majority rule are also often from the lower courts. Cf. *In re Deposit of Public Moneys,* 52 D & C 646, 93 P.L.J. 147 (Pa. Com. Pl., 1945).

The opinions of the highest state courts hereinbefore discussed are important to the proper consideration of this case. They indicate that there is a substantial Constitutional issue here. They are part of the ample line of cases holding statutes like the one here challenged to be Constitutionally infirm. They show the issue here to be well within the ambit of this Court. *United States v. Morgan,* 307 U.S. 183, 59 Sup.Ct. 795, 83 L.ed. 1211 (1939); *United States v. MacMillan,* 253 U.S. 195, 40 Sup.Ct. 540, 64 L.ed. 857 (1920); *United States v. Mason,* 218 U.S. 517, 31 Sup.Ct. 28, 54 L.ed. 1133 (1910); *Florida v. Anderson,* 91 U.S. 683, 23 L.ed. 458 (1876). Since a rule of reason is ultimately the basic law of our land, it is for this Supreme Court to determine whether an asserted right guaranteed to all citizens of these United States is denied by the laws of any state. *Angel v. Bullington,* 330 U.S. 183, 67 Sup.Ct. 657, 91 L.ed. 832 (1946); *Pollock v. Williams,* 322 U.S. 4, 64 Sup.Ct. 792, 88 L.ed. 1095 (1944). State authorities indicate that a serious Federal issue exists here.

Particular Problems Analyzed:

This appeal is intended to raise three specific issues, all of which are inherently a part of the foregoing discussion and each of which will now be discussed in greater depth individually. These issues are that the state statute challenged here because it provides that all interest earned on funds placed in Court Registries automatically become public (county) funds (a) violates the Fifth Amendment to the United States Constitution; (b) violates the Fourteenth Amendment to the United States Constitution; and (c) violates Article IV, §4 of the United States Constitution.

Fifth & Fourteenth Amendments:

For purposes of this appeal the Fifth and Fourteenth Amendments to the United States Constitution may be discussed simultaneously. This is so because Appellant Webbs is concerned with the Constitutional maxim found in both amendments that "No person shall be deprived of life, liberty or property, without due process of law" as well as the companion maxim that "no private property shall be taken for public use except upon the payment of just compensation."

Appellant Webbs maintains that since "interest goes with the principal as the fruit with the tree" (*Himely v. Rose,* supra) and since the interest on Appellants' money was clearly taken for public use pursuant to a state statute, that statute must be stricken as violative of the Federal Constitution. Appellant observes that even Florida recognizes in situations other than ones involving Registries of State Courts, the use of property constitutes a taking. *Riverside Military Academy v. Watkins,* 19 So.2d 870 (Sup.Ct. Fla., 1944).

We begin with the principle that the Fifth Amendment's command that private property shall not be taken for public use without just compensation is obligatory on the states. *Gideon v. Wainwright,* 372 U.S. 335, 83 Sup.Ct. 792, 9 L.ed.2d 799 (1963). Thus what is prohibited to the national government is prohibited to the states – and privately owned property may not be taken without just compensation being given therefore. *West v. Chesapeake & Potomac Tel. Co.,* 295 U.S. 662, 55 Sup.Ct. 894, 79 L.ed. 1640 (1935). The states are so bound. *Penn. Central Transportation Co. v. New York City,* 438 U.S. 104, 98 Sup.Ct. 2646, 57 L.ed.2d 631 (1978). The effect of retaining all interest here earned, in addition to a statutory fee, may be to deprive creditors already hurt by Webbs' financial misfortune of access to the Courts. In effect, the state presumes to tax access to the Courts, the price of justice being the going rate of interest plus a pre-set statutory flat fee. Basic justice must be without unreasonable charge. *Boddie v. Connecticut,* 401 U.S. 371, 91 Sup.Ct. 780, 28 L.ed.2d 113 (1971). If this Court can strike a statute which imposes too heavy a penalty upon an unsuccessful litigant as a clog upon the privilege of access to the Courts, surely it must strike a statute which would so penalize successful litigants. *Life & Casualty Insurance Co. v. McCray,* 291 U.S. 566, 54 Sup.Ct. 482, 78 L.ed. 987 (1934). A charge upon access to the Courts which relates to a party's wealth or payment of fees is analogous to a poll tax and should not be permitted. *Harper v. Virginia State Board of Elections,* 383 U.S. 663, 86 Sup.Ct. 1079, 16 L.ed.2d 169 (1966). If the charge here made indeed be a tax it is subject to the requirements of the due process and equal protection clauses of the Federal Constitution. *Kahn v. Shevin,* 416 U.S. 351, 94 Sup.Ct. 1734, 40 L.ed.2d 189 (1974). Further, the charge must be deemed a tax under Florida

law since it is a charge imposed to support the operations of government rather than one classifiable as a fee and thus intended to merely offset the attendant expense to government for offering some service in exchange therefore. See *Flood v. State ex rel. Homeland Co.,* 117 So.385 (Sup.Ct. Fla., 1928). See also *Glisson v. Hancock,* 181 So.379 (Sup.Ct. Fla., 1938); *Atlantic Coast Line v. Lakeland,* 115 So.669 (Sup.Ct. Fla., 1927); *State ex rel. Buford v. Spenser,* 87 So.634, (Sup.Ct. Fla., 1921). Significantly, the Clerk told the Florida Supreme Court in his brief to that Court "the Circuit Court Clerk in this action, as a budget officer, will ultimately pay the interest accrued from the monies in interpleader into the general fund of Seminole County." Initial Brief of Appellants to Florida Supreme Court at page 12. The general fund of Seminole County pays for roads, sewers, police protection, animal control and all other general (non-judicial) functions of government. Under Florida law the Courts are not to be used as revenue collectors for general governmental purposes. See *Farabee v. Bd. of Trustees,* 254 So.2d 1 (Sup.Ct. Fla., 1971). Appellant argues such a use of the Courts also offends the Federal Constitution.

What is going on here is the sale of justice. It is a violation of rights even more basic than those set forth in the Constitution for it impedes the natural human right to justice:

> "We realize that the clause of the Magna Charta . . . which we have paraphrased . . . into 'All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay,' has generally been construed . . . against the selling of justice . . . in

> other words, that a free and reasonable access to the courts and to the privileges accorded by the courts, and without unreasonable charges, was intended to be guaranteed to every one. *Malin v. LaMoure County,* 145 N.W. 582 at 586 (Sup.Ct. N.D., 1916).

Finally, Appellant notes (but declines to argue extensively in the interests of time) that the challenged statute is so confusing, because it attempts to cover a multiplicity of subjects and situations, as to be rendered unconstitutionally vague. *Smith v. Goguen,* 415 U.S. 566, 94 Sup.Ct. 1242, 39 L.ed.2d 605 (1974).

Article IV:

Appellant Webbs realizes that its weakest argument in a precedential since lies under Article IV of the United States Constitution. This Article is the provision of basic law which provides both that the citizens of each state shall be entitled to all privileges and immunities of the citizens in the several states and that the United States shall guarantee to every state in the Union a "Republican Form of Government."

Traditionally this Court has opined that the guaranty of a Republican Form of Government is a political question for Congress and not a judicial question for the Courts. See *Ohio ex rel. Bryant v. Akron Metropolitan Park Dist.,* 281 U.S. 74, 50 Sup.Ct. 228, 74 L.ed. 710, (1930); *Cochran v. Louisiana State Board of Education,* 281 U.S. 370, 50 Sup.Ct. 335, 74 L.ed. 913 (1930).

Nonetheless, Appellant Webbs implores this Court to reconsider. All of the Constitution is for all of the people. All of the Constitution is for this Court to explain and interpret to all of the people. Surely, if a Hitler-like or a

Stalinesque figure were ever to obtain absolute power in any one of our States, this Court would find such a situation offensive to Article IV of our Constitution. Webbs urges this Court not to await such a catastrophe before giving Article IV meaning. Webbs prays that this Court will now see fit to breathe judicial life into such clause.

In lifting this prayer up to the Court, Webbs acknowledges this Court's decisions that: (a) the Federal Constitution does not impose on the states any particular form or plans for the distribution of governmental power [*Mayor of City of Philadelphia v. Educational Equality League,* 415 U.S. 605, 94 Sup.Ct. 1323, 39 L.ed. 2d 630 (1974)]; and, (b) how power is distributed by a state among its governmental organs is commonly, if not always, a question for the state itself and if enforceable at all by the national government is for Congress alone [*Highland Farms Dairy, Inc. v. Agnew,* 300 U.S. 608, 57 Sup.Ct. 549, 81 L.ed. 835 (1937)]; as well as (c) whether the legislative and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state . . . its determination one way or the other not being an element in the inquiry whether the due process of law prescribed by the Fourteenth Amendment has been respected by the state or its representatives when dealing with matters involving life or liberty. [*Sweezy v. New Hampshire,* 354 U.S. 234, 77 Sup.Ct. 1203, 1 L.ed.2d 1311 (1957)].

But this Court cannot give meaning to our Constitution if it is as a proverbial ostrich with its head in the sand as to any of the Constitution's parts. Furthermore, this Court has not always declined to consider the meaning and effect

of this portion of the Constitution and it should not do so now for "It is true that the United States guarantees to every state a republican form of government." *Minor v. Happersett,* 21 Wall. 162, at 175, 22 L.ed. 627 (1875).

Additionally, since a rule of reason is ultimately the basic law of our land, it is for this Supreme Court to determine whether an asserted right guaranteed to all citizens of these United States is denied by the laws of any state. *Angel v. Bullington,* 330 U.S. 183, 67 Sup.Ct. 657, 91 L.ed. 832 (1946); *Pollock v. Williams,* 322 U.S. 4, 64 Sup.Ct. 792, 88 L.ed. 1095 (1944). To refuse to so apply a single part of the Federal Constitution strains reason and good sense.

That portion of Article IV which places rights in the citizens cannot be disregarded here when the Constitutional provisions for the security of property, which should be liberally construed [*Boyd v. U.S.,* 116 U.S. 616, 6 Sup.Ct. 524, 29 L.ed. 746 (1886)], are at great risk. *Angel v. Bullington,* supra. The assertion of a Federal right, as Mr. Justice Holmes said, is not to be defeated under the name of local practice. *Davis v. Wechsler,* 263 U.S. 22, 44 Sup.Ct. 13, 68 L.ed. 143 (1923).

Here Appellant maintains that the appropriation for government use of all interest earned by the interpleader fund is a tax. It is clearly for this Court then to determine if the tax as here applied to appellants in fact affects Constitutional rights. *Storaasli v. State of Minn.,* 283 U.S. 57, 51 Sup.Ct. 354, 75 L.ed. 839 (1931). Further, no matter how the state Court may characterize the charges imposed on use of the Court Registry, the United States Supreme Court is not bound by the guises into which State Courts may cast a tax. *St. Louis Cotton Compress Co. v. Arkansas,* 260 U.S. 346, 43 Sup.Ct. 125, 67 L.ed. 297 (1922). See

also *Allegeyer v. Louisiana,* 165 U.S. 578, 17 Sup.Ct. 427, 41 L.ed. 832 (1897). To permit the Courts to function as tax collectors would reduce them to a subordinate branch of government. *Ex parte Coffelt,* 228 P.2d 199 (Crim.Ct. App. Okla., 1951). This Supreme Court should not permit such a state of affairs to exist in light of the provisions of Article IV of the Federal Constitution.

The *Coffelt* decision, supra, bears analysis. In *Coffelt* the State Appellate Court commented on a purported one dollar per case assessment of "costs" for a "Pardon and Parole Fund:"

> "(T)he legislature seeks to collect under the guise of costs a tax for the maintenance of the Pardon and Parole officer and his assistants. Such an attempt clearly violates the fundamentals of the division of powers. It is an attempt to make the courts discharge the function of the executive branch of the government and use them as a tax gathering agency. . . It is a veiled effort to pervert the high functions of the courts, infringe upon their sacred responsibility in the administration of justice only, and make them a collecting agency for the executive branch of government. . . The very idea of such is repugnant to the American concept that the 'Courts of justice . . . be open to every person' . . . The fees we may collect are only those necessarily incident to the role of a tax gatherer for the executive branch of government. To permit such would reduce the courts to a subordinate branch of the government, and pervert its position of coequality with the legislative and executive departments." *Coffelt,* supra, at 202 and 203.

As to such charges, the Florida Courts are in substantial accord. *Farabee v. Bd. of Trustees,* 254 So.2d 1 (Sup. Ct. Fla., 1971), supra.

Perhaps surprisingly, however, the leading case dealing with the issue of the meaning of Article IV of the Federal Constitution comes to us not from the Federal Judiciary but from the Supreme Court of Kansas. Its decision in *VanSickle v. Shanahan,* 511 P.2d 223, (Sup.Ct. Kan., 1973) is the most thoughtful and erudite available on the point of law now before this Court. *VanSickle* was an action challenging the validity of a State Constitutional amendment. In *VanSickle* the Kansas Court made the following points while upholding the validity of amendments to the State Constitution:

(a) The contention that all cases arising under the guaranty clause, Article IV, Section 4, of the United States Constitution, are nonjusticiable, has no historical precedent. As in other cases wherein the "political" controversy bar to judicial enforcement has been raised, courts must look to the facts and circumstances surrounding the litigation, as well as the theory upon which the Constitutional challenge is premised, to ascertain whether the issue may be resolved by the judicial process.

(b) In determining whether a question falls within the category of a "political" controversy, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination, are dominant considerations.

(c) Prominent on the surface of any case held to involve a political question is found a textually demonstrable Constitutional commitment of the issue to a coordinate

political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an intial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarassment from multifarious pronouncements by various departments on one question.

(d) *An outstanding feature of the American constitutional system is the separation of the legislative, executive, and judicial powers of the government.* The governments both state and federal, are divided into three departments, each of which is given the powers and functions appropriate to it. Thus a dangerous concentration of power is avoided, and also the respective powers are assigned to the department best fitted to exercise them.

(e) Generally speaking, the legislative power is the power to make, amend, or repeal laws, the executive power is the power to enforce the laws, and the judicial power is the power to interpret and apply the laws in actual controversies.

(f) *The doctrine of separation of powers is an inherent and integral element of the Republican Form of Government, and separation of powers, as an element of the Republican Form of Government, is expressly guaranteed to the states by Article IV, Section 4, of the Constitution of the United States.*

(g) The purpose of the provisions of Article IV, Section 4, of the Constitution of the United States, guaranteeing to each state a Republican Form of Government, is to protect the people of the several states against aristocratic and

monarchial innovations and against insurrection and domestic violence, and to prevent them from abolishing a Republican Form of Government. But such provisions do not forbid the states from amending or changing their laws in any way they may see fit, provided they do not exchange Republican for anti-republican principles.

Thus under the *VanSickle* decision, a Court may exercise authority to enforce and uphold Article IV, Section 4, of the United States Constitution. It is an authority this Court should accept and discharge after giving due consideration to expanding upon even *VanSickle* in the sense that the Kansas decision shows a willingness to tolerate a redistribution of powers among the three branches of government — provided the result of the redistribution is not "anti-republican." The danger of such a restrictive judicial viewpoint is clear. It is acknowledged all three branches of government are necessarily equal partners in the maintenance of a "Republican Form of Government." But, once an anti-republican government is established as the result of successive anti-republican incursions into our system, each one of which incursions in itself may not be sufficient to effect an overall change in the basic nature of our government, it will be too late for this or any other Court to speak. Once anti-republicanism is established, the Courts will stand mute and powerless. Will the Courts only then realize that anti-republicanism is equivalent to anti-democratism and that the opposite of a Republican Form of Government is a totalitarian one? Once such a totalitarian situation is permitted to arise, the judiciary will be powerfuless to correct it.

There is another less dramatic reason this Court should act in the case before it to revive Article IV of the United States Constitution. Here, unlike *VanSickle,* the action questioned does not rise to the dignity of an action

through the people by means of an amendment to their State's Constitution. Here we are looking at a state legislative incursion into Federal Rights, not an incursion (as was the case in Kansas) made by the people themselves and therefore perhaps a bit more tolerable.

In the instant proceeding the legislative authority has presumed, in effect, to tax utilization of the Court Registry and to constitute the Court, through its Clerk, as a tax collector. The legislature here attempts to regulate the terms and conditions upon which the Court Registry may be used. This is anti-republican. This places our concept of equality in the separate branches of government at risk. It is therefore appropriate that this Court now speak and declare that such invasions by one branch of (state) government into the exclusive realm of another will not be tolerated. If this Court remains silent it may someday itself seek to speak on this point only to find that the price of its silence was the emasculation of the various state judiciaries and the abolition of a system of free, fair and unfettered justice in each of the states throughout this Republic, as well as in the national government itself.

CONCLUSION

For the reasons stated this Court should accept jurisdiction herein and the decision of the Supreme Court of Florida should be reversed with a declaration that §28.33, Official Florida Statutes, 1977, is unconstitutional.

Respectfully submitted,

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in proper person.

CERTIFICATE OF SERVICE

I, the undersigned counsel for Appellants in the cause above-captioned, and a member of the Bar of the United States Supreme Court, hereby certify and affirm that all parties required to be served with the foregoing brief, including Harry A. Stewart of 201 S.E. 6th Street, Ft. Lauderdale, Florida 33301, have been served with the foregoing in accordance with Supreme Court Rules.

/s/ Harvey M. Alper
HARVEY M. ALPER, ESQUIRE

APPENDIX A

Arthur H. BECKWITH, Jr., Clerk of the Circuit Court, etc., Appellants,

v.

WEBB'S FABULOUS PHARMACIES, INC., et al., Appellees.

No. 55213.

Supreme Court of Florida

May 31, 1979

Rehearing Denied Oct. 4, 1979.

Harry A. Stewart, Sanford, for appellants.

Harvey M. Alper and William H. Wack, of Law Offices of Alper & Wack, Altamonte Springs, for appellees and Harvey M. Alper as receiver, in pro per.

PER CURIAM.

The constitutionality of section 28.33, Florida Statutes (1977), which provides that interest accruing on funds in the registry of the court shall be deemed income of the Office of the Clerk of the Circuit Court, is before the court.[1]

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[1] § 28.33 Fla.Stat. (1977), reads in pertinent part:

> Moneys deposited in the registry of the court shall be deposited in interest-bearing certificates at the discretion of the clerk, subject to the above guidelines . . . All interest accruing from moneys deposited shall be deemed income of the office of the clerk of the circuit court investing such moneys and shall be deposited in the same accounts as are other fees and commissions of the clerk's office. Each clerk shall, as soon as is practicable after the end of the fiscal year, report to the county governing authority the total interest earned or all investments during the preceding year.

We hold the statute constitutional. Art. V, § 3(b)(1), Fla.Const.

Eckerd's of College Park, Inc. (Eckerd's) entered into an agreement with Webb's Fabulous Pharmacies, Inc. (Webb's) to purchase Webb's assets. Eckerd's, pursuant to statutory authority, filed an interpleader action against Webb's and its creditors, tendering the purchase price of $1,812,145.77. The court appointed a receiver to determine the number and amount of claims filed against these funds and to establish accounts for the deposit of the funds.

On Eckerd's motion, the trial court ordered that the purchase price be deposited in the registry of the court. The court also ordered the clerk to deposit the funds in "an assignable interest bearing account at the highest rate of interest." The court reserved ruling on whether the interest earned on the money would accrue to the court's clerk's office. The clerk followed the court's order. The receiver filed a motion seeking to obtain the interest earned on the money in the sum of $91,474.71. In an order granting the receiver's motion, the trial court held section 28.33, Florida Statutes (1977), unconstitutional to the extent it applied to these "private" monies. The clerk appealed to the Fourth District Court of Appeal and that court transferred the case to this court.

It is the receiver's position (apparently adopted by the trial court), that it is constitutionally inconsistent to have funds held by a receiver and invested by him to result in earnings to the prevailing party, yet funds held by the clerk of the circuit court earning interest to be kept for the general treasury. The statute is also unconstitutional, says the receiver, because it violates section 57.051, Florida

Statutes (1977),[2] and constitutes either a taking without due process of law or an unlawful tax.

[1,2] We begin our analysis by reviewing rules of law so well established as not to require citation. It is not this court's responsibility to determine the wisdom of legislative acts, nor is it the court's function to strike down legislative schemes because we would have fashioned different plans for achieving the desired results. We must begin with the presumption that the act is constitutional, and it is to be upheld unless a specific provision of the state or federal constitution is clearly violated.

Inherent in the trial judge's ruling is a finding that interest earned is the private property of the person ultimately receiving the principal. This proposition rests on the underlying premise that the principal remains private when deposited in the clerk's registry. Neither the premise nor the conclusion withstands close analysis.

[3] Section 28.33 does two things: (1) it authorizes the clerk to invest money in the registry of the court in order to earn interest; and (2) it dictates the disposition of the interest earned. Without this statute, the clerk would have no authority to invest money held in the registry of the court. It is the statute itself which gives the authority to the clerk and outlines the method of disposition.

The notion that title to the interest flows from title to the principal is erroneous. As all other funds in that account, these funds are considered "public money" from the time they are deposited in the general registry of the

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[2] § 57.051, Fla.Stat. (1977), reads in pertinent part:

> (1) PROHIBITION. — No officer shall make two charges for the same official act or service, nor charge for any constructive service. No fee shall be charged for any official service performed or claimed to be performed by any officer unless the fee is specifically authorized and its amount is specified by law.

court to the time they leave the account. *See Money v. State ex rel. Florida First National Bank*, 206 So.2d 436 (Fla. 1st DCA 1968); § 219.01(2), Fla.Stat. (1977).

[4] The receiver states that the interest retained by the clerk of court is either a fee or a tax. It is neither. The statute permits the state to retain only the amount representing interest earned on funds invested by the clerk, a function of the clerk expressly created by the statute. Interest accrues only because of section 28.33. In this sense, the statute takes only what it creates. Failure to recognize this fact would result in the erroneous holding that the clerk is required to pay interest on all funds on deposit with the registry of the court.

[5] It is irrelevant that had these funds been initially held by a receiver, the interest earned would have accrued to the party receiving the principal. In that event, judicial discretion would have been exercised and the legislature, under our separation of powers doctrine, could not effect a change in the court's order. Art. II, § 3, Fla.Const. The legislature has the right, however, to decide that funds held by a public officer in a public account accrue to the benefit of all of the people.

[6] There is no unconstitutional taking because interest earned on the clerk of the circuit court's registry account is not private property.

[7] The rule announced today shall apply in this case and in all cases where deposits of funds are made after the effective date of this opinion.

Accordingly, the order of the trial judge is reversed, the statute is held to be constitutional, and the case is remanded to the trial court for further action consistent with this opinion.

It is so ordered.

ENGLAND, C.J., and ADKINS, BOYD, SUNDBERG, HATCHETT and ALDERMAN, JJ., concur.

OVERTON, J., concurs in part and dissents in part with an opinion.

OVERTON, Justice, concurring in part, dissenting in part.

I agree that the subject statute is constitutional but only if it is construed as directory rather than mandatory. In my opinion, the trial judge must have the discretionary authority to direct the disposition of the interest earned on funds placed in the registry of the court pursuant to a court proceeding. To hold otherwise allows the legislative branch to improperly interfere with the resolution of a judicial matter.

In my opinion, in order for the statute to be constitutional, the trial court must continue to retain its inherent discretionary authority to direct disposition of the interest earned on funds placed in the registry as part of a court action. Without such authority, the assertion that the retention of the interest by the county is an unconstitutional interference with the judicial process has merit. The clerk receives a fee separate from the interest for acting as a depository, so the interest cannot be considered as a service charge. Section 28.33, Florida Statutes (1977), concerns the investment of all county funds held by the clerk, not just funds in the court registry. Moneys deposited in the "registry of the court" are funds which are strictly and directly controlled by the court. This control is exclusively a judicial function. Allowing the clerk the discretion to earn interest on those funds without any judicial control results in a surcharge on the use of the justice system, and can neither be justified nor allowed if the courts are to be

"open to every person for redress of any injury." Art. I, § 21, Fla.Const. In the instant case, the mandatory price tag for the use of the justice system, under the majority opinion, is $91,474.71. The impropriety of such a charge is even more egregious when we consider the fact that there are statutes which require the interpleading of funds into the registry of the court. *See, e.g.*, § 676.106, Fla.Stat. (1977) [Uniform Commercial Code].

I would uphold the constitutionality of the statute and construe the part relating to court registry funds as directory, allowing the trial judge to affirmatively direct the disposition of interest earned. If there were no such affirmative judicial action, the interest earned would be disposed of in acccordance with the statutory provision.

APPENDIX B

28.33 Investment of county funds.—The Clerk of the Circuit Court in each county shall make an estimate of his projected financial needs for the county and shall invest any funds in designated depository banks in interest-bearing certificates or in any direct obligations of the United States in compliance with federal laws relating to receipt of and withdrawal of deposits. All investments shall be open for bid to all qualified depositories in the county. The clerk shall select the highest and best bid for deposit. All bids received by the clerk shall include, but not be limited to, the interest rate to be earned and the total amount of dollar return to be paid to the clerk. In the event of a like bid between two or more banks, the moneys shall be divided and deposited in each bank, so long as the total interest income from the divided deposits will not be less than the total interest income had the deposits not been divided. If at the time of bid the dollar return on direct obligations of the Federal Government is greater than the highest bank return, then the clerk shall invest in the higher return security. Moneys deposited in the registry of the court shall be deposited in interest-bearing certificates at the discretion of the clerk, subject to the above guidelines. No clerk investing such funds shall be liable for the loss of any interest when circumstances require the withdrawal of funds placed in a time deposit and needed for immediate payment of county obligations. In any county where local banks refuse to bid on securing such money on interest-bearing certificates, the clerk may request and receive bids from banks in other counties within the state and make such deposits to the successful bidder. All interest accruing from moneys deposited shall be deemed income of the office of the clerk of the circuit court investing such moneys and shall be deposited in the

same accounts as are other fees and commissions of the clerk's office. Each clerk shall, as soon as is practicable after the end of the fiscal year, report to the county governing authority the total interest earned on all investments during the preceding year.